UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

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TOMASA ROMERO SOLIS, et al. *

versus * Case No. 9:18-cv-83

L. FRANK CISSNA, Director, United States Citizenship and Immigration Services, and UNITED STATES CITIZENSHIP AND IMMIGRATION SERVICES * May 30, 2018

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REPORTER'S OFFICIAL TRANSCRIPT OF THE MOTION TO DISMISS HEARING HELD BEFORE THE HONORABLE MARGARET B. SEYMOUR UNITED STATES DISTRICT JUDGE, MAY 30, 2018

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Proceedings recorded by mechanical stenography using computer-aided transcription software.

(Call to order of the Court.)

3:50PM **THE COURT:** Good afternoon. You may take your seats.

3:50PM This afternoon we have a hearing in the matter of Solis, et al.

3:50PM versus Cissna, et al. This is civil action number 18-83. And

3:50PM we are here on the defendants' Motion to Dismiss, and I'll hear

3:51PM from the defendants at this time.

3:51PM **MR. KURZ:** Good afternoon, Your Honor.

3:51PM **THE COURT:** Good afternoon.

3:51PM **MR. KURZ:** Julian Kurz representing defendant, U.S.

3:51PM Citizenship and Immigration Services.

3:51PM The Court should dismiss this case for failure

3:51PM to state a claim. Count 1, the mandamus claim, should be

3:51PM dismissed because plaintiffs do not identify any statute or

3:51PM regulation that requires the agency to make U visa waiting list

3:51PM decisions, let alone a statute or regulation that requires the

3:51PM agency to do so within a specific time frame.

3:51PM Count 2, the unreasonable delay claim, should be

3:51PM dismissed because plaintiffs do not allege any facts that

3:51PM provide a basis to compel the agency to adjudicate their

3:51PM petitions at the expense of equally deserving U visa

3:51PM petitioners.

3:51PM And Count 3, the due process claim, should be

3:52PM dismissed, because as the Fourth Circuit has held, quote, "A

3:52PM U visa application does not create a liberty or property

3:52PM interest protected by the due process clause."

3:52PM Going back to the mandamus claim, plaintiffs rely exclusively on 8 CFR Section 214.14(d)(2) which provides that, "All eligible petitioners who, due solely to the cap, are not granted U-1 nonimmigrant status must be placed on a waiting list." The key word is "eligible". If USCIS decides that a petitioner is eligible, then it has a duty to place the petitioner on the waiting list.

THE COURT: So how -- how do they decide when somebody is eligible?

MR. KURZ: They review the evidence that the petitioner submits. Oftentimes they conduct background checks, request additional evidence. In many U visa cases, the majority, the petitioner also needs to have a ground of inadmissibility waived. So there's an additional step of adjudicating an application for a waiver of inadmissibility, and without that waiver, the petitioner can't obtain U visa status. So these are all things that the agency has to do to decide whether -- whether to grant or deny a petition.

THE COURT: So the plaintiffs are arguing that they are required to be placed on this U visa waiting list, but you're saying that they have to be determined eligible before they can be put on this list. Is that what you're saying?

MR. KURZ: That's right, Your Honor.

THE COURT: And so there's nothing that requires the government to determine eligibility at any particular time?

3:53PM **MR. KURZ:** Not at any particular time. There may be some statute or regulation that requires the government to make U visa waiting list decisions, but the stat -- the regulation upon which plaintiffs rely is not it. They rely --

3:54PM **THE COURT:** So you're saying there is something out there. They just didn't name the right one. Is that what you're saying?

3:54PM **MR. KURZ:** It's not clear to me that there is something out there, that there is any requirement that the agency make U visa waiting list adjudications, and this regulation certainly does not require it. This regulation requires only that if a petitioner is eligible -- which is a decision that is made through the adjudication process -- that that petitioner is placed on a waiting list once the agency finds that she's eligible. Then there's a duty to place the person on the waiting list.

3:54PM Here they want to compel the agency to make that -- do the initial step of determining whether they are eligible to be placed on the waiting list.

3:54PM **THE COURT:** So in this case, these plaintiffs have not been determined to be eligible? Is that what you're saying?

3:54PM **MR. KURZ:** Yes, Your Honor.

3:54PM **THE COURT:** So this average waiting period that you've cited in your briefs, is that the eligibility period, or

is that the waiting list period? I think you've cited something like 50 -- 40 something to 50 months. Is that the period to determine eligibility, or is that the period to determine -- from eligibility to get on the waiting list? Which period is that?

MR. KURZ: That is the -- that is the period of time for adjudication, which is typically an adjudication that results in placement on the waiting list.

THE COURT: The eligibility adjudication period.

MR. KURZ: Yes, yes, the determination of eligibility, and if no U visas are available at the time that decision is made, then the petitioner is placed on the waiting list as opposed to being given a U visa right away.

THE COURT: So what is the average time for an applicant to be placed on the waiting list, assuming the yearly cap has been met? You've already met your --

MR. KURZ: Well, it's difficult to say the average time. Currently the -- the estimated time or the average time is approximately 42 months, and the upper range or 130 percent of the average time is 54.5 months, but that time fluctuates all the time, and the reason for that is -- or one of the reasons for that is that many petitions fall into exceptions to the general rule. The general rule is that the -- that applications are adjudicated in the order in which they are filed. The agency starts to adjudicate petitions on a

3:56PM 1 first-in, first-out basis. Of course, some take longer to
3:56PM 2 adjudicate than others, but the exceptions to that general rule
3:56PM 3 are that when a -- when ICE makes a request to USCIS based on
3:56PM 4 the fact that a U visa petitioner is in removal proceedings or
3:56PM 5 is subject to a final removal order, then the agency expedites
3:56PM 6 adjudication. Now that the current administration has
3:56PM 7 increased its enforcement efforts, there are more petitioners
3:57PM 8 who fit into those exceptions. There are more people who
3:57PM 9 either are subject to final removal orders who were in removal
3:57PM 10 proceedings, and thus the agency has fewer resources to devote
3:57PM 11 to the petitioners who don't fall into those exceptions, and so
3:57PM 12 the times keep getting longer for those petitions to be
3:57PM 13 adjudicated.
3:57PM 14 **THE COURT:** So these individuals suffer because you
3:57PM 15 have no resources? Is that what you're saying?
3:57PM 16 **MR. KURZ:** Yeah, this is a --
3:57PM 17 **THE COURT:** So why are there not more resources? If
3:57PM 18 the government is going to impose this, why don't they also --
3:57PM 19 if you're going to make a rule, then you do something to
3:57PM 20 enforce it. You get more resources if that's what you want to
3:57PM 21 do. Why has that not happened?
3:57PM 22 **MR. KURZ:** I agree with Your Honor that that would be
3:57PM 23 ideal for Congress to allocate more resources and more funding,
3:57PM 24 but numerous Courts recognize that this is a problem for the
3:57PM 25 political branches. This Court --

3:57PM **THE COURT:** Have there been any proposals to get more resources for this department?

3:57PM **MR. KURZ:** Well, the agency has requested additional funding, and --

3:57PM **THE COURT:** For this particular program?

3:58PM **MR. KURZ:** This agency has -- USCIS has said that U visas are a priority, and in fact, in August 2016 -- and this fact is subject to judicial notice. In August 2016, the agency began to assign petitions to a second service center. Previously only one service center was adjudicating them. Now two are. The agency did that to combat this backlog, but petitions have increased fivefold since fiscal year 2009. The backlog is now over 190,000 petitions, so the agency simply can't keep up. Congress hasn't allocated enough funding or resources, and really if the agent -- if the Court compelled the agency to adjudicate those petitions, it would just come at the expense of other U visa petitioners or more generally the agency's overall mission of adjudicating immigration benefit petitions. That's what USCIS does. It adjudicates petitions for immigration benefits, and compelling agency action here will just take away from other areas.

3:59PM **THE COURT:** Now, the plaintiff has cited to some reports and press releases regarding the pilot programs that USCIS has undertaken. Can you explain some more about these pilot programs?

3:59PM **MR. KURZ:** This is a pilot program to improve the reporting of processing times. Nothing in that report suggests that there is not a line for waiting list adjudications as plaintiffs have suggested. All that that report says -- and this is a quote from the -- this is a quote from the report. "USCIS has recently launched a pilot program to improve how the agency calculates and posts processing times." The goal of this project was to improve the reporting of processing times, not to actually improve processing times or to put things into align. These are already being -- these petitions are already being adjudicated on a first-in, first-out basis. They're -- the agency starts to adjudicate them in the order in which they are filed. The only issue that is raised in that report is that the agency needed to improve the way it was communicating to members of the public or to petitioners the time that it takes for their petitions to be adjudicated.

THE COURT: Are there any pilot programs specific to the U visa application process?

MR. KURZ: This pilot program is not specific, I don't believe, to the U visa program. In fact, it applies specifically to four other types of immigration benefits, including the I-130 and three others.

THE COURT: So there is no pilot program for the U visa program?

MR. KURZ: The agency -- I'm not a hundred percent

4:00PM sure on this, but I believe that the agency is testing out this
4:00PM program in four benefit categories, including the I-130, and
4:00PM then based on the results of that program -- and again, this is
4:00PM just about reporting processing times, but this reporting
4:00PM program, they're testing it out with four types of benefit
4:00PM petitions, and then if it works well, they'll use it for all
4:00PM the others, including U visa petitions.
4:01PM **THE COURT:** So going back to 8 CFR 214.4(d)(2), USCIS
4:01PM is required to place plaintiffs on the U visa waiting list and
4:01PM provide plaintiffs a written notice of such placement; correct?
4:01PM Is that what that provides? The statute that we're talking
4:01PM about here, the requirement to place people on this waiting
4:01PM list.
4:01PM **MR. KURZ:** (d)(2) -- (d)(2) says that, "All eligible
4:01PM petitioners who, due solely to the cap, are not granted U-1
4:01PM nonimmigrant status must be placed on a waiting list." And
4:01PM then the second part of it provides the rule of reason, which
4:01PM is that, "Priority on the waiting list is determined by the
4:01PM date the petition was filed." Is that what Your Honor quoted?
4:01PM **THE COURT:** Yeah. So there's a requirement that --
4:01PM based on this regulation, USCIS is required to place
4:02PM individuals on a U visa waiting list and provide them with
4:02PM written notification; is that correct?
4:02PM **MR. KURZ:** No, Your Honor.
4:02PM **THE COURT:** Once they've been determined to be

4:02PM 1 eligible, they're not required to --
4:02PM 2 **MR. KURZ:** Yes, once they are determined to be
4:02PM 3 eligible, then they're required to be placed on the waiting
4:02PM 4 list.
4:02PM 5 **THE COURT:** But there's no provision for the first
4:02PM 6 part to determine what happens when -- to make them eligible?
4:02PM 7 So they're just sort of floating around waiting for
4:02PM 8 eligibility, and then once they're granted eligibility, then
4:02PM 9 they have to be put on this list? Is that what you're saying?
4:02PM 10 **MR. KURZ:** Once they get to the front of the line, so
4:02PM 11 to speak, and the agency adjudicates their petition, finds that
4:02PM 12 they are eligible for placement on the waiting list -- in other
4:02PM 13 words, that they would get a U visa --
4:02PM 14 **THE COURT:** So you get in line to be eligible, but
4:02PM 15 you could be in that line forever, and then once you're
4:02PM 16 eligible, you have to be on a waiting list. Is that what
4:02PM 17 happens?
4:02PM 18 **MR. KURZ:** If there are no visas available, then
4:02PM 19 you'd have to go on the waiting list. You can't be in the line
4:03PM 20 forever; just as long as it takes for the agency to adjudicate
4:03PM 21 all the other petitions that are filed before yours.
4:03PM 22 **THE COURT:** So what is the average time for people to
4:03PM 23 be on this eligibility waiting list -- not waiting list, but
4:03PM 24 waiting to be on the --
4:03PM 25 **MR. KURZ:** You're asking once a --

4:03PM **THE COURT:** Before -- how long does it take to be eligible is what I'm trying to find out.

4:03PM **MR. KURZ:** To be found to be eligible?

4:03PM **THE COURT:** Yes.

4:03PM **MR. KURZ:** The average time is 42 months approximately. That's an estimate of the average time that it takes, 42 months. The agency says that the current case inquiry date is December 10th, 2013. If a case -- if a petition was filed before that time, it's considered to be outside normal processing times. That's the date beyond which the agency considers in -- a petition to have sat for too long, and that's the point at which it -- it instructs or tells petitioners that they can contact the ombudsman for assistance with finding out about the status of their petition.

4:04PM **THE COURT:** So there is a process. If a person feels they've been waiting too long to be eligible, there's an administrative process to have somebody look into it?

4:04PM **MR. KURZ:** That's correct, yes.

4:04PM **THE COURT:** All right. And how long do you have to be waiting for eligibility to do that?

4:04PM **MR. KURZ:** My understanding is that a petitioner can make that request once they're beyond the normal processing times or this case inquiry date --

4:04PM **THE COURT:** Which is?

4:04PM **MR. KURZ:** Which is currently 54.5 months ago.

4:04PM **THE COURT:** So if I were waiting for eligibility, and I've been waiting 56 months, then I can go through this other process?

4:04PM **MR. KURZ:** Then you can ask the agency, "Why is this taking so long? Will you look into --"

4:04PM **THE COURT:** So how does one know what this magic period is, the 52, the 42, the 56 months? How does one know?

4:05PM **MR. KURZ:** It's posted on the USCIS website, and that's the issue with the report. Plaintiffs argue that the times posted on the website are not accurate, and the agency recognized that they could improve that, and we acknowledged that. But the bottom line is that plaintiffs seek to jump to the front of the line. Regardless of any deficiencies in reporting of processing times, the point remains that if a Court compelled agency action here, it would just be encouraging petitioners to filed these types of lawsuits to jump to the front of the line, and nothing distinguishes Miss Solis from the plaintiff -- other U visa petitioners whom she seeks to jump in line, or at least she hasn't alleged anything that would distinguish her in the complaint.

4:05PM **THE COURT:** Okay. So -- so your position as -- that these plaintiffs want to get in front of everybody else as opposed to trying to improve the process, I mean -- they want -- it appears based on their complaint that they want to -- they feel that they're being treated differently than you

4:06PM treat other U visa applicants, because it's taking them longer
4:06PM to get an eligibility -- eligibility determination than other
4:06PM people in their same situation.
4:06PM **MR. KURZ:** No.
4:06PM **THE COURT:** You disagree with that?
4:06PM **MR. KURZ:** Yes. There's absolutely no evidence of
4:06PM that. The only evidence that they've cited to support that
4:06PM point is another case that's before another judge in this
4:06PM district, and they cite to a stipulation, and they say that
4:06PM another petition -- I can't talk about the facts of that case,
4:06PM because the statute prohibits me from doing so, but if I talk
4:06PM about this hypothetically, I think Your Honor will understand.
4:07PM This is basically the situation. If a principal
4:07PM petitioner -- so there are principal petitions and derivative
4:07PM U visa petitions, and the derivatives are adjudicated at the
4:07PM same time as the principal petition to which they correspond.
4:07PM So if a principal petitioner filed in 2012 and then her
4:07PM derivative files in 2015, the derivative will be adjudicated
4:07PM before a principal petition that was filed in 2013 or 2014,
4:07PM because it relates back to that 2012 one.
4:07PM There's no evidence that the agency is
4:07PM adjudicating petitions out of order. The only other evidence
4:07PM that they -- that they cite is these examples of -- of
4:07PM expedited adjudication. As I mentioned, when a petitioner is
4:07PM in removal proceedings or subject to a final removal order, her

4:07PM 1 petition gets priority, and that makes sense, because those are
4:08PM 2 people who face an immediate threat of removal from the
4:08PM 3 country. Miss Solis is not in removal proceedings. She
4:08PM 4 doesn't have a final removal order. She does not face an
4:08PM 5 immediate threat of deportation, so it makes sense for the
4:08PM 6 agency to prioritize someone else's petition.
4:08PM 7 **THE COURT:** So is USCIS still making U visa waiting
4:08PM 8 list decisions? Are you still making those decisions?
4:08PM 9 **MR. KURZ:** Of course.
4:08PM 10 **THE COURT:** Plaintiffs have alleged that you've
4:08PM 11 stopped doing that.
4:08PM 12 **MR. KURZ:** There's absolutely no evidence on that. I
4:08PM 13 don't know on what basis they allege that. They, in fact,
4:08PM 14 point to examples of petitions that have been adjudicated.
4:08PM 15 **THE COURT:** So you're still making those decisions on
4:08PM 16 people that are not in removal proceedings?
4:08PM 17 **MR. KURZ:** Now, that is not -- yes, but only in a
4:08PM 18 limited number. As I mentioned, the -- the exceptions, the
4:08PM 19 people who are in removal proceedings or subject to a final
4:08PM 20 removal order, consume such a large portion of the agency's
4:08PM 21 resources because so many people now do fall into those
4:09PM 22 exceptions that there are not many resources remaining for the
4:09PM 23 people who don't fall into those exceptions. But yes, some of
4:09PM 24 them are being adjudicated, and --
4:09PM 25 **THE COURT:** So what percentage of those people --

4:09PM those cases are being adjudicated, the ones that are not in removal status?

MR. KURZ: I don't know the percentage, Your Honor.

And going back to the legal standard for an unreasonable delay claim, many courts analyze these types of claims under a six-factor test set out in 1984 D.C. Circuit case, TRAC, Telecom Research and Action Council or -- and the fourth TRAC factor is the effect of compelled agency action on activities of competing priority. Just last year, Judge Gergel recognized that when the competing priorities factor weighs in an agency's favor, Courts have quote "refused to grant relief", even though all the other factors considered in TRAC favored it.

Here the competing priorities factor weighs in the agency's favor, because compelling the agency to adjudicate the plaintiff's petitions would produce no net gain, and it would come at the expense of the plaintiffs who are ahead -- of the petitioners who were ahead of plaintiffs in the line awaiting U visa adjudications.

And given that plaintiffs haven't distinguished themselves from the people whom they seek to jump in line, they can't state a claim for unreasonable delay. This is an issue of funding and of resources. Your Honor asked whether there's anything that plaintiffs could do if they wanted to complain about the length of time that this is taking, if they wanted to

4:10PM challenge that in some way, and the answer is that they should
4:10PM talk to their senators and congressman and ask them to get
4:10PM Congress to allocate more funds to USCIS or specifically to
4:10PM USCIS's budget for adjudicating U-visa's petitions. Until
4:10PM Congress allocates more funds, the agency's just doing the best
4:11PM it can with the resources that it has. It's making U visa
4:11PM petitions a priority. It added a second service center to
4:11PM start adjudicating additional petitions, that fact subject to
4:11PM judicial notice. There's been a fivefold increase in petitions
4:11PM since 2009. The agency now has over 192,000 -- 190,000 U visa
4:11PM petitions pending.

4:11PM I haven't said much about the due process claim,
4:11PM but the Fourth Circuit has held that a plaintiff -- plaintiff
4:11PM who asserts a procedural due process claim must show that she
4:11PM has property or liberty interest at stake, and the Fourth
4:11PM Circuit has also said that a U visa application does not create
4:11PM a liberty or property interest protected by the due process
4:11PM clause. So here plaintiffs can't establish that they have any
4:11PM liberty or property interest at stake.

4:12PM As I mentioned, there are many reasons why
4:12PM adjudication times can vary. Some petitions take longer to
4:12PM adjudicate than others, because the agency needs to request
4:12PM additional evidence from the petitioner. Sometimes the agency
4:12PM needs to go to the law enforcement agency that certified that
4:12PM the petitioner was eligible for the U visa and request

4:12PM additional information from them. Sometimes the agency does
4:12PM background checks. As I mentioned, oftentimes there's a waiver
4:12PM of inadmissibility that needs to be adjudicated in addition to
4:12PM the actual U visa petition. So all these things can cause a
4:12PM variation in the adjudication times. And that also doesn't
4:12PM show -- the fact that the adjudication times is varied doesn't
4:12PM show that the agency is not following the rule of reason. It
4:12PM starts adjudicating them in chronological order, just as a
4:12PM Court would. As cases come in, the Courts start to adjudicate
4:12PM them, but all cases aren't necessarily resolved in the same
4:13PM amount of time. It's the same thing here.

THE COURT: Okay. Thank you very much.

MR. KURZ: Thank you.

THE COURT: All right. I'll hear from the plaintiff.

MR. BANIAS: Thank you, Your Honor. And may it please the Court, my name is Brad Banias, and I, along with my co-counsel Stephanie Nodine, represent Miss Solis and her family.

THE COURT: Okay.

MR. BANIAS: Your Honor, Ms. Solis has been waiting 39 months. 39 months. When we filed the Amended Complaint, she was at three full years since she filed her U visa application. Our contention today is that the decision, the limited decision to put her on the wait list, Your Honor -- that is, she would need to get on to a waiting list to then

wait for the Visa -- that 39 months is an unreasonable delay.

THE COURT: So has anything been done with regard to her eligibility request?

MR. BANIAS: Your Honor, in the government's Motion to Dismiss, they state affirmatively that they have not started adjudication of her application. In our original complaint in this court, we did a FOIA cause of action, and the government, to their credit, turned over the file, and there's no indication in anything that we've been seeing that any adjudicatory act has taken place, Your Honor, and so I think the answer to that question is no. I think the government would agree with that.

The government also came up and averred a lot of facts. It also denied a lot of facts from our complaint. And, Your Honor, that's not what a 12(b)(6) motion is for. If they want to deny allegations and they want to aver other facts, they can answer the complaint. They can provide a certified administrative record to prove it, and we can let this Court decide whether the delay is unreasonable under the Administrative Procedure Act, through dispositive motions, and that's what this Court should do.

My opposing counsel, he said it's an issue of resources. Well, they need to prove that. They've said that, "We adjudicate on a first-in, first-out basis." Your Honor, we disagree with that, and we do assert there is no line, but we

4:15PM also assert other facts that would prove that up.

4:15PM We -- there's a lot of discussion about the new
4:15PM reported processing times. First, USCIS, the defendant here,
4:15PM has admitted that it has known that its processing times were
4:15PM inaccurate for about the last five years. To improve that,
4:15PM they have now started expressing processing times in a range.
4:15PM So it'll say, "January to December. If you filed your
4:15PM application anytime within that 12 months, you can expect a
4:15PM decision." That necessarily indicates that if I filed it in
4:15PM August -- or someone filed in August and I filed in January,
4:15PM then the later-filed application could be decided the same time
4:15PM as the earlier-filed application. They're being treated
4:15PM differently. They're being started at different times, Your
4:15PM Honor. And at a minimum, we've alleged sufficient facts to
4:15PM state a claim for that basis.

4:16PM My opposing counsel mentioned the other case,
4:16PM the stipulated dismissal that was cited. That case is actually
4:16PM in front of Your Honor. It's called Romero Aguilar. We filed
4:16PM that on the same day we filed this case. The plaintiffs in
4:16PM Romero Aguilar filed their U visa derivative applications at
4:16PM the same time as Ms. Solis and her family; filed their
4:16PM principal and derivative applications, and I can tell you this.
4:16PM The Romero Aguilar, as the stipulated dismissal notes, never
4:16PM received a wait list decision, Your Honor. They received
4:16PM visas. Okay? They skipped over the entire wait list process.

4:16PM And so the distinction between the eligibility
4:16PM versus the wait list versus the visa is being skipped over,
4:16PM which leads to our allegation that the agency -- for
4:16PM petitioners not in removal proceedings or without a removal
4:16PM order, the agency is just choosing not to make wait list
4:16PM decisions.
4:16PM And this problem, these delays, the prejudice
4:16PM from them are being compounded. Just a couple of weeks ago,
4:17PM the current Attorney General issued a new decision called
4:17PM "Castro-Tum". I don't want to get too into the weeds, but
4:17PM essentially the current Attorney General said that immigration
4:17PM judges can no longer administratively close a removal
4:17PM proceeding. For years immigration judges have seen people in
4:17PM immigration court who have a U visa application pending, and
4:17PM they would administratively close the case. So now that
4:17PM administrative closure is no longer allowable by immigration
4:17PM judges, U visa applicants who are still in those removal
4:17PM proceedings are going to flood the agency, and all of those
4:17PM people, as my opposing counsel just admitted, will jump the
4:17PM line, jump in front of Miss Solis. And so this concept of a
4:17PM line is just the wrong metaphor, Your Honor.
4:17PM My opposing counsel also noted derivatives are
4:17PM treated differently than principle applicants. This notion of
4:17PM a line is just wrong.
4:17PM **THE COURT:** So my understanding is that if you

filed -- if the principal filed an application in 2001 say, derivative filed an application in 2002, then the derivative's would jump ahead and be adjudicated the same time as the person in 2001; is that true?

MR. BANIAS: I'm guessing -- I think that's the position of the government. But, Your Honor, I don't think there's anything that systematic about it, and that's why this is inappropriate to dismiss on 12(b)(6). The government needs to prove there's a line.

And I'll just point you to that case from just February of this year up in Chicago called *Haus*, H-a-u-s, *v. Nielsen*. It's cited in our briefing, where the judge addressed this exact same argument out of my opposing counsel's same office up in D.C. and essentially said, "The Court is only dealing with the plaintiff's complaint. The government has not been called upon to offer any sort of explanation for the delay." We are before they get the opportunity to explain. They need to answer. They need to file a certified administrative record, and we need to do dispositive cross-motions. And, Your Honor, if they can't provide a complete certified administrative record, then we need to talk about supplementing or completing it.

THE COURT: What's the difference between the relief you're seeking in your request for mandamus and what you're seeking under the APA claim? Are they the same? Are you

seeking something different?

MR. BANIAS: I think that the relief is the same, but the nature of the challenge is different. A mandamus, from our perspective, would be appropriate if the agency has completely stopped doing something that it's required to do. And we -- I do want to point out, Your Honor, you pointed to the language of 214.14(d)(2), and you are exactly right. It says, "All eligible petitioners who, solely due to the cap, are not granted U-1 nonimmigrant status must be placed on the waiting list." That's mandatory language. My opposing counsel has identified and created new --

THE COURT: Well, he had a different category. You have to be eligible before you can get on the list.

MR. BANIAS: That's right, Your Honor. In our mandamus claim, to answer the question, we allege that all of our people are eligible, and that they're not making wait list decisions for eligible petitioners.

I want to point out the nature of the decision that has to be made before you can go on the wait list, it comes from the statute, Your Honor. 8 USC 1227(d), and it's -- that section is titled "Administrative Stay". And it says, "If the Secretary of Homeland Security determines that an application for nonimmigrant status under (T) or (U) of this title filed for alien sets forth the prima facie case for approval," a prima facie case for approval, that the Secretary

4:20PM can grant an administrative stay. That's the only decision
4:20PM that has to be made. This is a far cry from the case that they
4:20PM cite throughout their brief out of D.C called *Mashpee*. That
4:20PM was where a group I think from Connecticut was seeking to be
4:20PM deemed a tribe in front of the Bureau of Indian Affairs, and if
4:20PM you look through the analysis that had to take place in that
4:21PM particular case -- again, that's their primary case they rely
4:21PM on -- it required a genealogist. It required a historian. It
4:21PM required all sorts of other experts, and you know how many
4:21PM people were in that line, Your Honor? Ten. Ten people were in
4:21PM that line, and they could prove there was a line. That's a far
4:21PM cry from a prima facie determination that the applicants are
4:21PM eligible to get them on to the wait list.
4:21PM **THE COURT:** So if the Court were to determine that
4:21PM there's an unreasonable delay, what relief -- what are you
4:21PM requesting the Court to do?
4:21PM **MR. BANIAS:** At this stage, Your Honor, we're just
4:21PM asking you to deny the Motion to Dismiss and let the government
4:21PM prove their case or try. Give us a certified administrative
4:21PM record. If that record indicates that 39 months is a
4:21PM reasonable delay, then, Your Honor, my clients lose, and we
4:21PM keep waiting. If it indicates it's an unreasonable delay and
4:21PM that as we believe the FOIA shows it's just been sitting on a
4:21PM shelf for three years -- literally, we have the shelf number --
4:22PM then this Court should order the agency to make a decision on

those applications or take adjudicatory action to get them on to the wait list. Once they're on the wait list, Your Honor, they can apply for a -- for work authorization. With work authorization, they can apply for a social. With a social and work authorization in the state of South Carolina, they can acquire a driver's license.

This is a far cry also from the case that my opposing counsel cited that I lost last year in front of the Judge Gergel called *Alkassab*. In the *Alkassab* case, Judge Gergel pointed out that the plaintiff there had work authorization and had a stay of removal. But I urge this Court to go and look at that case and look at the entire docket on PACER, because after we lost the case, the government came in and said, "Look, under our processing times, Mr. Alkassab will get an interview for his asylum application in October of 2017." We lost the case. We didn't appeal. We wanted to wait. October 2017 came and went. No interview. One year from the decision, about two weeks shy of that, the agency changed its way of doing asylum interviews; not first-in, first-out. We filed a Rule 59/Rule 60 to indicate that the information that the Court had relied on, processing times, clearly wasn't accurate, and that the agency had changed things up. Through a settlement we resolved that, and Mr. Alkassab ended up with an interview, and that's all of record.

But I do want to point out, I think the flaw in

that *Alkassab* decision was that Judge Gergel denied it at the 12(b)(6) stage. He didn't make the government prove it, and that's what we're asking you to do here today, Your Honor.

Say that we -- find that we have stated a claim. Find that the defendant cannot deny and aver things in a 12(b)(6) motion, and order them to provide a certified administrative record and let us brief this in front of you, Your Honor. Thank you.

THE COURT: All right. Anything else?

MR. KURZ: Yes, Your Honor, just briefly, if I may.

THE COURT: You may.

MR. KURZ: First, the facts that the government has averred here are subject to judicial notice. We're talking about statistics that are available on a government website and are not subject to reasonable dispute. The backlog is subject to judicial notice, the extent of the backlog. The number of petitions before the agency is subject to judicial notice. The processing times are subject to judicial notice.

Opposing counsel mentioned repeatedly that the Court should wait -- not dismiss this case at this stage, and that the appropriate thing would be to see the administrative record. It's not clear to me what that even means in this context. We're not talking about an administrative review case. Typically an administrative record is the record of the agency's adjudication that the Court then reviews. This is an

4:24PM unreasonable delay claim.

4:24PM I'm not sure exactly what he means when he says

4:24PM that the government should produce an administrative record.

4:24PM We're talking about the funding that Congress has allocated for

4:25PM USCIS, the size of USCIS's budget, the number of employees that

4:25PM it has to adjudicate U visa petitions. Until Congress

4:25PM allocates more funds, there's really nothing that the agency

4:25PM can do, and there's no other facts that the Court needs or that

4:25PM the government can really produce. I don't know what he means

4:25PM when he says that the agency should produce an administrative

4:25PM record. We're talking about unreasonable delay.

4:25PM He also said that -- that plaintiffs have

4:25PM alleged that they are eligible and that, therefore, they must

4:25PM be placed on the waiting list. They can't just allege that

4:25PM they are eligible and then say that the agency has a clear duty

4:25PM to place them on the waiting list. The agency has to go

4:25PM through the adjudication process and decide if they are

4:25PM eligible based on a review of the evidence that they've

4:25PM submitted. And the full adjudicatory process has to -- has to

4:26PM be completed before they can -- before -- in other words, they

4:26PM don't plausibly allege that they're eligible. That's something

4:26PM that the agency has to decide based on a process.

4:26PM And then just finally, he mentioned this

4:26PM Northern District of Illinois case, *Haus*, in which the Court

4:26PM said that it wasn't appropriate to resolve this on a Motion to

Dismiss, and I'd say that there the Court relied on a Seventh Circuit case from 2017 called *Calderon-Ramirez* that interestingly actually affirmed a dismissal of an unreasonable delay claim on a Motion to Dismiss. And *Calderon-Ramirez* had looked at the statistics and other facts that I mentioned, and then the *Haus* Court said, "Well, given that we're looking at all these facts as to the reasons for -- for the delay, that -- the amount of the agency's resources, that's something we should look at on summary judgment." But what I think the *Haus* Court failed to recognize is that all those facts are subject to judicial notice. We're talking about statistics, the size of the agency's budget. There's really nothing that can come out in summary judgment that would change anything.

The relevant facts here are statistics that are available on government websites, so there's no reason for the Court to require the government to produce an administrative record, whatever that would mean here.

Plaintiffs have failed to state a claim, and defendants respectfully request that the Court dismiss the case pursuant to Rule 12(b)(6). Thank you.

THE COURT: Thank you. Let me ask Plaintiff's counsel about the administrative record issue and what it is that you think that that would provide that the Court doesn't already have.

MR. BANIAS: Yes, Your Honor. The idea that you can

do an APA case without an administrative record is confusing to me, and I will tell you I spoke to plaintiff's counsel in *Haus* this afternoon, and the government turned over a record in that case, so I'm a little confused. But the record's got to prove -- we can't -- whether there's a line or not is not a statistic. The -- we can look and see the budget that was provided to USCIS.

THE COURT: So what -- let me just make sure I understand. When you say you want the administrative record, you want the administrative record for your client's case, what has been done with their case?

MR. BANIAS: That's right.

THE COURT: What record the government has on their case?

MR. BANIAS: That's right, Your Honor.

THE COURT: So you would be asking the government to give you the file for these individuals, and you would be able to look at that and determine what's happened. Is that what you're saying?

MR. BANIAS: I think that's right, Your Honor. And we would argue -- I mean, in a hypothetical world, we could imagine an administrative record that proves that delay here is reasonable. Let's say it shows that the agency did do an investigation, that that investigation took six months, and then it had to go to a different agency, and the third party

4:28PM agency went abroad and did some other investigation, and then
4:28PM it came back. I can imagine that if we saw ongoing progress in
4:28PM a case, that the administrative record would prove up the delay
4:29PM was reasonable. I don't think that is what we're going to find
4:29PM here, but either way, I think my client is entitled to see
4:29PM whether the delay is arbitrary and capricious, violative of the
4:29PM Constitution, or falling below a right created by statute under
4:29PM 706(2)(a) of the Administrative Procedure Act. That's where we
4:29PM get the language that this Court can compel an unreasonably
4:29PM withheld decision; 706, the same place we get the standards for
4:29PM challenging a final agency action. So I don't think they're as
4:29PM different as my opposing counsel claims they are.
4:29PM And I will say this, Your Honor. If the
4:29PM government can't provide an administrative record, I'm happy to
4:29PM engage in open discovery with them.
4:29PM **THE COURT:** All right.
4:29PM **MR. BANIAS:** Thank you, Your Honor.
4:29PM **THE COURT:** Does the government keep records on each
4:29PM individual who's filed a complaint, and how are they kept?
4:29PM **MR. KURZ:** Your Honor, opposing counsel has
4:29PM acknowledged that his client's file has sat on a shelf.
4:29PM Nothing has been done in their case. We can give them the
4:30PM application that they submitted. Other than that, I don't know
4:30PM what the administrative record is here.
4:30PM **THE COURT:** So you would agree --

4:30PM **MR. KURZ:** Nothing has been done.

4:30PM **THE COURT:** So you agree that this plaintiff's case has sat on a shelf and nothing has been done?

4:30PM **MR. KURZ:** Yes. She hasn't reached the front of the line. It's not her turn yet.

4:30PM **THE COURT:** So nothing -- absolutely nothing has been done with her case yet. You've accepted her application.

4:30PM **MR. KURZ:** That's correct. She received a notice that the agency received her application, and the last time --

4:30PM **THE COURT:** And she got in line, and no one has looked at her case since then, because she's just in the line; correct?

4:30PM **MR. KURZ:** That's correct.

4:30PM **THE COURT:** All right. So that's the administrative record. She got a letter saying she's -- her application has been accepted.

4:30PM **MR. BANIAS:** And, Your Honor, if the government wants to do dispositive motions on whether sending a notice over 39 months is a reasonable adjudicatory process, I guess that's what we'll do, but I do think that the statement that my opposing counsel makes that she gets in the back of the line is we need to see that line. If we -- we can't take their word for it.

4:31PM **THE COURT:** So you want to see everybody that's ahead of her and when their applications were filed? Is that what

you want to see?

MR. BANIAS: I would imagine that the agency has some sort of record, some sort of processing times. We hear about processing times. What are those times actually measuring? What is the process? I think that will comprise part of the administrative record, to show the Court whether it is resources; whether, you know, they've gotten 50 applications and they only have 10 adjudicators, and so every adjudicator gets five a day, that sort of process. If we don't see that process at all, then I do think we take -- go back to the world of mandamus where the statute says you make a decision, and you give them a notice. You give them notice of that, and if they're fully failing to do a nondiscretionary duty, I think it gets us out of the unreasonable delay world and back into the mandamus claim.

THE COURT: Is there any written procedure for what happens after an application is filed? Like where does it go? What office does it go to? Who reviews it? What are they looking at, and how do they make the determinations? Is that in the statute or the regulation?

MR. KURZ: Yes, Your Honor, the statute and the regulations clearly set out the requirements to obtain a U visa. That's --

THE COURT: I'm talking about the eligibility requirement.

4:32PM **MR. KURZ:** The procedure is that the petition is sent to either the Vermont service center or the Nebraska service center, and apart from that, petitions are adjudicated, and they start to be adjudicated in the order in which they're filed, other than the exceptions that I mentioned.

4:32PM **THE COURT:** So how many people are doing this eligibility determination?

4:32PM **MR. KURZ:** How many people? I don't know how many people. I know that in August of 2016, the agency added a second service center to increase the number of people presumably by approximately double who are adjudicating, making these U visa waiting list decisions. All the relevant facts here are before the Court. If the Court moves us to summary judgment phase, the briefs would look exactly the same.

4:33PM **THE COURT:** Okay.

4:33PM **MR. BANIAS:** And, Your Honor, I want to correct one of my statements. The application here was actually moved, transferred to Nebraska from Vermont. And so maybe we have two pieces of paper in that certified administrative record. But again, what you're asking for, Your Honor, how this is being processed, who's processing it, and whether this is indeed due to a lack of resources or indeed due to some strict chronological adjudication, that's -- that's what the government's got to prove. We can't rely on their word for it, and statistics alone don't support the allegations that my

opposing counsel is making today. Thank you, Your Honor.

THE COURT: Okay. Thank you. All right. Thank you very much. I'll take it under advisement.

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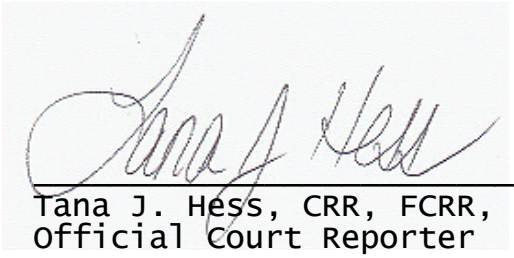
CERTIFICATE

I, Tana J. Hess, CCR, FCRR, Official Court Reporter for the United States District Court, District of South Carolina, certify that the foregoing is a true and correct transcript, to the best of my ability and understanding, from the record of proceedings in the above-entitled matter.



Tana J. Hess, CRR, FCRR, RMR
Official Court Reporter